STATE OF MICHIGAN

COURT OF APPEALS

AMY RENEE LINCKS,

Plaintiff-Appellant,

v

MICHAEL CHAD ADAMS,

Defendant-Appellee.

UNPUBLISHED
April 30, 1999

No. 212404
Barry Circuit Court
LC No. 93-000474 DP

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

This case involves the custody of the parties' minor child who was born in 1993. The trial court originally granted plaintiff sole custody of the child after she filed a complaint for paternity against defendant. The court modified custody in a subsequent stipulated order which granted the parties joint legal and physical custody of the child. Then, plaintiff filed a petition for sole physical custody. After a two-day hearing, the trial court awarded defendant sole custody of the child. Plaintiff appeals as of right.

This Court must affirm all custody orders unless the trial court made findings that were against the great weight of the evidence, committed a palpable abuse of discretion or made a clear legal error on a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877, 900; 526 NW2d 889 (1994). Under MCL 722.23; MSA 25.312(3), the trial court must consider eleven separate factors in determining the child's best interests in a custody dispute. The trial court's findings on each factor considered should be affirmed unless the evidence clearly preponderates in the other direction. *Id.* at 879.

In the present case, plaintiff does not dispute the trial court's findings that the parties were equal as to all factors except MCL 722.23(d), (e), (g) and (i); MSA 25.312(3)(d), (e), (g) and (i) which are listed as follows:

> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

* * *

(g) The mental and physical health of the parties involved.

* * *

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

First, plaintiff argues that the trial court erred when it found factors (d), (e) and (g) in favor of defendant and against the great weight of the evidence. We disagree. As to factors (d) and (e), the record supports the trial court's finding that defendant had established a more stable environment. Defendant's partner testified that she had lived with defendant for three years and had assumed a motherly role with the child. Defendant testified that he had full-time employment and does "everything" with the child. Although plaintiff has lived in the same house for several years, her life has been less stable than defendant's since the child's birth: she has been involved in several "live-in" relationships, had an affair with a married man, used drugs within the last year, and moved to Traverse City for a short time. Plaintiff testified that she was not currently employed and probably had five different jobs in the last year. Given plaintiff's less than stable lifestyle, we conclude that the trial court's finding that factors (d) and (e) were in defendant's favor was not against the great weight of the evidence.

As to factor (g), in which the trial court considered the parties' use of drugs, both plaintiff and defendant admitted that they used drugs before the child's birth. However, while there was no evidence that defendant has used drugs recently, plaintiff admitted that she used drugs about two years before the hearing. Furthermore, Steve Reed testified that he and plaintiff used drugs less than six months before the custody hearing. Based on this testimony, the trial court's finding that factor (g) was in defendant's favor was not against the great weight of the evidence.

Second, plaintiff argues that the trial court erred in failing to hold an evidentiary hearing to determine whether the child was capable of expressing a reasonable preference for custody. We disagree.

In a child custody proceeding, the trial court must consider factor (i), the "reasonable preference of the child, if the court deems the child to be of sufficient age to express preference." MCL 722.23(I); MSA 25.312(3)(i); *Treutle v Treutle*, 197 Mich App 690, 694; 495 NW2d 836 (1992). In the present case, the trial court did not consider the child's preference for two reasons. First, neither party asked the judge to talk with the child. Second, the judge was sure that the four-year-old child would be "too young to express a reasonable preference."

Plaintiff cites *In re Custody of James B*, 66 Mich App 133, 134; 238 NW2d 550 (1975), for the proposition that the trial court cannot decline to interview a four-year-old child to determine the child's preference. However, *James B* is distinguishable from the present case, because neither plaintiff

nor defendant requested that the trial court interview the child. Likewise, in the two other cases cited by plaintiff, *Lewis v Lewis*, 73 Mich App 563, 564; 252 NW2d 237 (1977), and *Flaherty v Smith*, 87 Mich App 561, 564-565; 274 NW2d 72 (1978), we determined that the trial court erred because it declined or refused to interview the child. It does not appear to us that either *James B*, *Lewis* or *Flaherty* requires the trial court to consider evidence of a child's preference when neither party offers to present the child to testify or express a preference to the judge. Accordingly, we hold that the trial court did not err when it failed to perform an unrequested interview with the child.

Finally, plaintiff argues that the trial court erred in granting defendant sole physical custody of the child because defendant did not request sole physical custody. We disagree. Before plaintiff filed her petition to modify custody and grant her sole physical custody, the parties exercised joint legal and physical custody of the child. Defendant's response to plaintiff's petition requested a continuation of the joint legal and physical custody arrangement and included a general prayer for equitable relief. The trial court awarded defendant sole physical custody of the child even though he did not request that relief.

Plaintiff relies on our opinion in *Mann v Mann*, 190 Mich App 526, 538; 476 NW2d 439 (1991), where we determined that the trial court committed clear legal error by awarding sole legal custody of the children to the plaintiff when he never requested it, because the trial court changed legal custody without giving the defendant notice and an opportunity to be heard. In *Mann*, the parties' divorce judgment awarded the parties joint legal custody of their children, with the defendant being awarded sole physical custody. *Id.* at 527-528. The plaintiff filed a motion to change physical custody based on the living conditions at the defendant's house. *Id.* at 528, 538. Even though the plaintiff did not request a change in legal custody, the trial court granted the plaintiff "sole legal custody, without notice to the parties and without even stating its reasons for doing so." *Id.* at 538. Under these facts, we held that the trial court committed clear legal error, reasoning that trial the court deprived the defendant of notice to be heard on the issue of legal custody and noting that the defendant may have presented different proofs or made different tactical decisions if she knew that the court would decide the issue. *Id.*

However, *Mann* is distinguishable from the present case because plaintiff's own motion raised the sole issue of modification of physical custody; the parties presented evidence on that issue. Unlike *Mann*, the trial court restricted its ruling to the single issue of physical custody. Although defendant in the present case did not request sole physical custody of the child, the trial court had to rule on whether to modify physical custody and consider the child's best interests. Because the overwhelmingly predominant factor in child custody cases is the welfare of the child, *Harper v Harper*, 199 Mich App 409, 417; 502 NW2d 731 (1993), we conclude that the trial court in the present case should not have been restricted to either maintaining the status quo of joint physical custody or awarding plaintiff sole physical custody. Furthermore, defendant's response to plaintiff's petition included a general prayer for equitable relief which was sufficient to allow the trial court to fashion an appropriate equitable remedy. See *Choals v Plummer*, 353 Mich 64, 73; 90 NW2d 851 (1958). Accordingly, we hold that the trial court did not err when it awarded defendant sole custody of the child.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Jeffrey G. Collins